

**In The
Supreme Court of the United States**

October Term, 1995

**EXXON COMPANY, U.S.A.;
EXXON SHIPPING COMPANY,**

Petitioners,

v.

**SOFEC, INC.; PACIFIC RESOURCES, INC.;
HAWAIIAN INDEPENDENT REFINERY, INC.;
PRI MARINE, INC.; PRI INTERNATIONAL INC.,**

Respondents,

v.

**GRIFFIN WOODHOUSE, LTD. AND
BRIDON FIBRES AND PLASTICS, LTD.,**

Third-Party Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

**RESPONDENTS' AND THIRD-PARTY RESPONDENTS'
JOINT BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

**MAX W. J. GRAHAM, JR.
Counsel of Record**

**BELLES GRAHAM PROUDFOOT
& WILSON**

**Watumull Plaza
4334 Rice Street, Suite 202
Lihue, Kauai, Hawaii 96766-1388
(808) 245-4705**

*Attorneys for Third-Party Respondent
Bridon Fibres & Plastics, Ltd.*

[Additional Counsel Listed on Inside Cover]

JOHN R. LACY
Counsel of Record
GOODSILL ANDERSON QUINN
& STIFEL -
1800 Alii Place
1099 Alakea Street
Honolulu, Hawaii 96813
(808) 547-5700

*Attorneys for Third-Party
Respondent Griffin
Woodhouse, Ltd.*

GEORGE W. PLAYDON, JR.
Counsel of Record
REINWALD O'CONNOR
MARRACK HOSKINS
& PLAYDON
733 Bishop Street
2400 Mekai Tower
Honolulu, Hawaii 96813
(808) 524-8350

*Attorneys for Respondents
Pacific Resources, Inc.,
Hawaiian Independent
Refinery, Inc., PRI Marine,
Inc., PRI International Inc.*

RANDALL K. SCHMITT
Counsel of Record
McCORRISTON MIHO MILLER
& MUKAI
Five Waterfront Plaza,
4th Floor
500 Ala Moana Boulevard
Honolulu, Hawaii 96813
(808) 529-7300

*Attorneys for Respondent
SOFEC, Inc.*

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INTRODUCTION

Certiorari, which "is not a matter of right, but of judicial discretion," is not warranted because there are no "special and important reasons"¹ presented by this case. Sup. Ct. Rule 10. Contrary to Petitioners' contentions, (1) the Ninth Circuit's decision conforms to this Court's admiralty policies; (2) any purported conflict among the circuits with regard to *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S. Ct. 1708, 44 L.Ed.2d 251 (1975) ("*Reliable Transfer*") and *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 84 S. Ct. 748, 11 L.Ed.2d 732 (1964) ("*Italia Societa*") are reconcilable on the facts of the cases; and (3) bifurcation of the trial by the District Court was appropriate and not violative of due process.

This is a case in which the gross negligence of a captain placed his vessel in a position of peril wholly of his own making. It is one which involves a unique set of facts and circumstances which are highly unlikely to recur and within which there are simply no national or international ramifications that necessitate review by this Court.

¹ The Proposed Supreme Court Rule 10 states that "A petition for a writ of certiorari will be granted only where there are compelling reasons therefor."

COUNTERSTATEMENT OF THE CASE²

Petitioners have once again attempted to present the events of March 2, 1989 as a pell mell rush to disaster. As demonstrated by the record, however, nothing could be farther from the truth, nothing could be farther from the evidence, nothing could be farther from the findings of the trial court, and nothing could be farther from the affirmation of the appellate court. Respondents, mindful of the admonition of this Court's Rule 15, will attempt to demonstrate by this Counterstatement of the Case, that the series of actions taken by the master of the EXXON HOUSTON and his crew over the space of approximately three hours were, as found by the trial court and affirmed by the Ninth Circuit Court of Appeals, the sole cause of the vessel's stranding. As such, these actions and/or omissions operated as a superseding intervening cause to sever any liability or responsibility on the part of Respondents. These actions and omissions by the master and the vessel's crew from the breakout to the stranding were done in a calm and deliberate manner, without any pressure of eminent peril. (CL 34.) In sum, it was the master's

² While Petitioners' Statement of Facts contains no significant misstatements of fact, Respondents have set forth a more complete and accurate recitation of the facts. Citations to the record contained herein are abbreviated as follows:

- CR: Clerk's Record
- RT: Reporter's Transcript
- ER: Excerpts of Record
- SER: Supplemental Excerpts of Record
- FF: Findings of Fact contained in Appendix D to Petition for Writ of Certiorari
- CL: Conclusions of Law contained in Appendix D to Petition for Writ of Certiorari

gross negligence alone that brought about the stranding. (CL 46.)

The contract which brought Petitioners' vessels to the solitary single point mooring buoy (SPM) at the offshore port operated by Respondent Hawaiian Independent Refinery, Inc. ("HIRI") in Hawaii called for HIRI to receive and pay for multiple shipments of Alaska North Slope crude oil delivered by Petitioners' vessel, and did so in broad form language only. (FF 7, 10; CR 433, Exhibit "A", SER 13-15.) Further, on multiple occasions prior to the incident of March 2, 1989, a number of Petitioners' vessels carrying various quantities of Alaska North Slope crude oil had called at the same SPM in the HIRI offshore port pursuant to this contract. In fact, on at least four of these occasions, the vessel making deliveries to the HIRI SPM was the EXXON HOUSTON itself, and, on at least two of those prior occasions, the EXXON HOUSTON had been under the command of Captain Coyne. (FF 15.) At no time prior to the breakout did Captain Coyne, any of Petitioners' other masters, or anyone else on behalf of Petitioners ever protest the use of HIRI's SPM, or claim in any manner that the port was unsafe under the terms of the contract. (2/9/93 RT 13, 33; 2/11/93 RT 175-76.)

The particular voyage of the EXXON HOUSTON, which resulted in these proceedings, began, from Respondents' perspective, on March 1, 1989. This was when the vessel arrived at HIRI's SPM located approximately a mile and a half off Ewa Beach on the southern shore of the island of Oahu, and began discharging its cargo of Alaska North Slope crude oil. (2/9/93 RT 47-48; Joint Exhibits ("J.Exh.") 1, 2, 29; ER 245, 246.)

The following day, on March 2, 1989, a "Kona" storm with winds and seas coming generally from the south,

caused a link in the chafe chain, part of the mooring assembly holding the vessel to the SPM, to break. (FF 25.) At the time the chain broke, the vessel was fully manned and operational. (FF 18.) The break in the chain released the EXXON HOUSTON from the mooring, causing the vessel to begin to drift, and putting the twin floating discharge hoses under tension. (FF 25.) This tension eventually caused the hoses to part (break). The first of these hoses parted close to the water line of the vessel. (FF 26.) This hose did not thereafter pose a threat to the ship's maneuverability. (FF 26.) The second hose parted at 1728 (5:28 p.m.) (hereinafter 24-hour clock references will be used to conform with the trial record) on March 2, 1989. (FF 27; 2/9/93 RT 37-38; 2/10/93 RT 23, 24, 31-38; 2/12/93 RT 194.)

The trial court designated the point in time that the second hose broke (1728) as the "breakout," and this point became the initiating time for the trial which has led to this Petition. (FF 27.) The holding of the trial court, which found the Petitioners' actions and omissions to be the sole cause of the stranding of March 2, 1989 (CL 44), and its affirmation by the Ninth Circuit Court of Appeals, focus upon the events that followed the breakout. The events which preceded 1728 on March 2, 1989, are simply irrelevant, and play no part in the review that this Court must make in determining whether or not certiorari is appropriate.

After the breakout at 1728 on March 2, 1989, there followed a period of two hours and 41 minutes which ended with the EXXON HOUSTON stranding on a chartered reef less than 1/2 mile from Barbers Point Light at 2009. (2/10/93 RT 129; 2/11/93 RT 190-191; J.Exh. 27, 28, 30.) During this two hour and 41 minute period, the

vessel's master, Captain Coyne, maneuvered the EXXON HOUSTON through a series of different phases. These phases were identified by the District Court in various sub-groupings within its findings of fact. These same phases are referred to in the Ninth Circuit Court of Appeals' affirmation and will be used here by Respondents in this Counterstatement of Facts. During this almost three-hour period, Captain Coyne and the crew of the EXXON HOUSTON had ample time to consider the situation and react accordingly. (FF 85.) The events did not tumble pell mell toward eventual disaster, as Petitioners would have this Court believe. (2/11/93 RT 144, 162, 170, 171; 2/17/93 RT 50, 82; 2/18/93 RT 64; SER 68 [Davis depo]; SER 84-86 [Kowalchuk depo].) Instead, Captain Coyne's post-breakout decisions were found to have been made calmly, deliberately and without the pressure of imminent peril. (CL 34.)

PHASE I - THE BREAKOUT

When the second hose parted at approximately 1728, it tore a heavy metal spool piece off the SPM, leaving approximately 840 feet of that hose connected to the ship's port manifold with approximately 100 feet of the hose submerged due to the weight of the spool piece. (FF 28; 2/11/93 RT 229; 2/12/93 RT 194; SER 65-66 [Davis depo].) At about 1730, two minutes after the breakout, the U.S. Coast Guard initiated a radio call to the EXXON HOUSTON and asked Captain Coyne if assistance was needed. The Captain refused this offer of assistance. He did not contact the Coast Guard again until after the stranding, two hours and thirty-nine minutes later. (FF 34; 2/10/93 RT 83-86; 2/11/93 RT 142; 2/12/93 RT 227-228.)

PHASE II - ATTEMPT TO ANCHOR

At approximately 1740 (12 minutes after the breakout), Captain Coyne attempted to anchor by dropping his starboard bow anchor and paying out one shot (90 feet) of chain. (SER 63 [Davis depo].) The area where the anchor was dropped had a depth of approximately 60-66 feet. (FF 35.) One shot of chain could not hold the ship in this depth of water. (FF 37.) Five or six shots of chain would have been required. (FF 37; 2/10/93 RT 40, 41, 44, 78; 2/12/93 RT 164; 2/26/93 RT 22; J.Exh. 2.) The EXXON HOUSTON had 12 shots of chain available. (FF 37.) Captain Coyne did not utilize the standard maritime practice of deploying extra chain by either going slightly astern (2/26/93 RT 22), or by pulling the chain out with the anchor windlass (2/18/93 RT 214). At 1747, after an attempt of only seven minutes, and still with only one shot of chain out, Captain Coyne abandoned the anchoring attempt. (FF 38; 2/10/93 RT 44, 45, 48; J.Exh. 2.)

At this point, Captain Coyne also negligently ignored the advice of Captain Marvin, the HIRI Mooring Master, to proceed to a safe anchorage known to Captain Marvin and near to the SPM. (2/12/93 RT 211-212; 2/17/93 RT 77-81; SER 90-91 [Spear depo].) After raising the starboard anchor at 1747, Captain Coyne never again attempted to anchor the EXXON HOUSTON even though a review of the ship's track revealed numerous areas where the vessel could have been safely anchored. (FF 41-42.)

PHASE III - THE TRANSIT

By 1803, the 75-ton, 65-foot, twin-screw, 800-horsepower assist vessel NENE had secured a line to the hose that remained attached to the EXXON HOUSTON, and the EXXON HOUSTON began backing to sea. (FF 43-44; 2/11/93 RT 227-3; 2/12/93 RT 112, 211, 212; J.Exh. 2.) Thus, just 35 minutes after the breakout and two hours and six minutes before the stranding, the cargo hose was under the positive control of the NENE; control the NENE did not relinquish until after the stranding. (FF 43.)

For the next 27 minutes (1803-1830), the EXXON HOUSTON backed in a general westerly direction at a speed of approximately two knots over the ground on an engine order ("bell") of half astern. (FF 44.) It followed an approximate course of 260 degrees true. (FF 44; 2/12/93 RT 211, 212, 219, 230; 2/17/93 RT 95; SER 72, 75 [Davis depo].) This course took the EXXON HOUSTON out to sea and away from shallow waters. (FF 44; 2/12/93 RT 219, 230; 2/10/93 RT 141, 145, 158; SER 67 [Davis depo]; J.Exh. 2.) The ship's position was noted on the navigational chart kept on the bridge of the EXXON HOUSTON at times 1803, 1820, and 1830. (FF 45; SER 62 [Davis depo]; J.Exh. 2.) The position on the chart at 1830 was to be the last plotted position of the EXXON HOUSTON until 2004, approximately one hour and 34 minutes later. (FF 49; 2/10/93 RT 108-110, 128; 2/11/93 RT 122; SER 92 [Spear depo]; J.Exh. 1, 2.) This 2004 position was taken just five minutes before the stranding with the vessel well into the final turn. (FF 81.)

PHASE IV – POST-1830 MANEUVERS

At 1831, Captain Coyne made a completely unforced decision to stop backing to sea (FF 46; 2/10/93 RT 142:17-23), and began a series of maneuvers called "backing and filling." Backing and filling was an alternate series of short ahead and astern bells in an attempt to maintain a sheltered area on the port side of the vessel for the removal of the hose. (2/10/93 RT 141-142, 154-156; 2/12/93 RT 219; 2/17/93 RT 95, 132, 141; J.Exh. 1, 2, 27, 28, 30.) Captain Coyne unilaterally decided to stop backing the vessel away from shore despite the fact that backing the vessel further to sea could have been accomplished without significant risk to the EXXON HOUSTON or the assist vessel NENE, and, in fact, continued backing posed much less of a risk than remaining near the lee shore while the Kona storm tended to push the ship toward shore. (FF 47.)

The backing and filling operation caused the ship to cease its progress away from shore and, in fact, caused the EXXON HOUSTON to begin to loiter at a position approximately one mile from the shore and about a half mile from the grounding line. (FF 46, 48; 2/10/93 RT 108-110; 2/19/93 RT 22, 53; 2/26/93 RT 32.)

PHASE V – NAVIGATION AFTER 1830

Even though there were adequate charted aids to navigation in the vicinity of Barbers Point where the EXXON HOUSTON was lingering, and two charts were available for the navigation of the vessel, there were no navigational positions plotted on either chart between 1830 and 2004 on the evening of March 2, 1989. (FF 50, 51; 2/10/93 RT 108-110, 128; 2/11/93 RT 122; SER 59-60, 64,

69, 76 [Davis depo]; J.Exh. 1, 2.) The trial court found that a prudent mariner would have fixed and plotted his vessel's position at least every fifteen to twenty minutes, and that it could be done without obliterating the information or prior fixes on the chart. (FF 50, 52; 2/18/93 RT 134, 234; 2/19/93 RT 129; 2/24/93 RT 93, 140, 142, 183; 2/26/93 RT 33; J.Exh. 2; SER 82 [Huhnke depo].) In fact, the frequent plotting of the vessel's position would have enabled Captain Coyne to determine the effects of wind, sea and any currents on the tanker and would have alerted him that he was approaching danger. (FF 53; 2/18/93 RT 238; 2/19/93 RT 23.) When Captain Coyne initiated the final turn at 1956, one hour and twenty-six minutes had passed since the last plotted position on any chart. Captain Coyne did not look at the navigational chart before commencing the turn. (FF 75.) Captain Coyne did not, in fact, know the EXXON HOUSTON's position when he started that final and fatal turn toward the lee shore of Oahu. (FF 61, 62, 76; 2/26/93 RT 32; 2/19/93 RT 128-129; 2/10/93 RT 125, 128-129; 2/11/93 RT 42, 144; J.Exh. 1, 2.)

PHASE VI – HOSE DISCONNECT AND CRANE FAILURE

At 1944, twenty-five minutes before the stranding, while both the EXXON HOUSTON and the NENE were being controlled by Captain Coyne, the vessels moved apart. This caused the EXXON HOUSTON's crane holding the detached hose to collapse and allowed the NENE to pull the hose clear of the EXXON HOUSTON by 1947. (FF 64-65; 2/10/93 RT 111, 114, 198; 2/11/93 RT 77; 2/13/93 RT 64, 78, 107; 2/17/93 RT 36-39, 101, 107; J.Exh. 28.) At 1948, Captain Coyne sent Second Mate Davis from

the bridge to evaluate seaman Denton, who was operating the crane when it collapsed. (FF 67; 2/10/93 RT 116; 2/18/93 RT 133; SER 61, 70 [Davis depo].) Seaman Denton had not suffered any injury. (SER 78-80 [Denton depo]; 2/11/93 RT 147:16-149:9.) Second Mate Davis was not immediately replaced on the bridge by another officer, although other officers were available. (FF 68, 69; 2/10/93 RT 128; 2/11/93 RT 24; SER 61, 73 [Davis depo].) Thus, from approximately 1948 to 2000, including the point in time when the final turn was initiated, Captain Coyne was the only officer on the bridge. *Id.* This failure to adequately man the bridge was in direct derogation of Exxon Shipping's navigational and bridge manual. (FF 68-70; 2/11/93 RT 25; J.Exh. 245, 250.) The trial court found that had the bridge been manned properly, the danger of stranding would have been avoided. (FF 71.)

PHASE VII – THE FINAL TURN

Captain Coyne, while he was the sole officer on the bridge (2/10/93 RT 116), and without looking at a navigational chart or knowing the ship's position, commenced the "final turn" at 1956. This was a turn to the right and toward the lee shore, a turn which the Court described and found to be "grossly negligent." (CL 38, 2/10/93 RT 124-129; 2/11/93 RT 42; 2/18/93 RT 212, 241, 243; 2/19/93 RT 1, 2, 20, 149-150; 2/24/93 RT 141-142; 2/26/93 RT 16, 22, 32, 39-40; J.Exh. 27, 28, 30.) By Captain Coyne's own testimony, this was a considered, unhurried decision. (CL 34.) In selecting this final turn toward the lee shore, the Captain rejected all other safe alternatives, which included a turn to the left, or port, away from the lee shore, or simply continued backing to sea, which had proven to be an effective maneuvering option. (FF 79, 80.)

At approximately 2000 (four minutes after the start of the final turn, and nine minutes before the stranding), Third Mate Spiller arrived on the bridge. He was asked by Captain Coyne to determine the ship's position and to plot that position on a chart. (2/10/93 RT 128-129; SER 94, 102 [Spiller depo].) Third Mate Spiller plotted the ship's position on a chart, labeled it with the time, 2004, and walked to the port wing of the bridge to show it to Captain Coyne. (FF 81.) When Captain Coyne saw the 2004 fix on the navigational chart, he exclaimed "Oh, shit!" (FF 82; SER 107-108 [Spiller depo]), and immediately ordered an increased speed of half ahead, followed, at 2002.5, by full ahead. (FF 82; SER 94-108; J.Exh. 1.) Three and a half minutes later, at 2009, the EXXON HOUSTON stranded on a reef that was clearly shown on the chart bearing the 2004 position. (FF 83, 84; 12/10/93 RT 128-129; J.Exh. 1.)

Captain Coyne's decision to turn to the right was made without any consideration of the other pieces of information which should have caused him to reject that turn. He did so without looking at a chart, without fixing or plotting the vessel's position for an hour and a half, without checking the NENE's position by radar or otherwise, and without consulting any of his officers or the Mooring Master. (FF 89.) Thus, Captain Coyne recklessly ignored all pertinent information that was available to him and proceeded on a course that resulted in the stranding of the EXXON HOUSTON at 2009, almost three hours after the breakout. (FF 89.) The underlying facts and findings in this proceeding are succinctly stated by the following concluding remarks of Judge T.G. Nelson writing for the Ninth Circuit in affirmation:

In sum, the district court found that Captain Coyne had ample time, as well as opportunity and available manpower, to take precautions which would have eliminated the risk of grounding, and that his failure to do so amounted to extraordinary negligence, superseding any negligence of the defendants with regard to the breakout or provision of safe berth after the breakout. Because the district court's findings are well supported by the record, we hold they are not clearly erroneous.

CONCLUSION

We hold the district court did not err in finding Captain Coyne's extraordinary negligence to be the sole proximate and superseding cause of the damage to the *Houston*, and we AFFIRM.

Opinion of the United States Court of Appeals for the Ninth Circuit, Appendix A to Petition for Writ of Certiorari, at App. 25.

CERTIORARI IS NOT WARRANTED

I. THERE IS NO CONFLICT AMONG THE CIRCUITS SIGNIFICANT ENOUGH TO WARRANT REVIEW BY THIS COURT

Petitioners contend that the decision below by the Court of Appeals for the Ninth Circuit "deepens" an existing conflict among the circuits over the applicability of common law intervening and superseding cause doctrines to admiralty tort liability in the wake of *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S. Ct. 1708, 44 L.Ed.2d 251 (1975). This is not the case. A review

of the relevant law from the circuits since *Reliable Transfer* reveals near unanimity with regard to the applicability of the superseding cause doctrine in admiralty cases. Moreover, the only post-*Reliable Transfer* case cited by Petitioners in support of their argument for a conflict among the circuits, *Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069 (11th Cir. 1985), contains unique factual circumstances and is actually silent with respect to superseding cause. Rather, that court focused its analysis on shared negligence and the separate question of plain intervening cause.

A. The Fifth, Eighth And Ninth Circuits Have Affirmed The Doctrine Of Superseding Cause.

In the twenty years since *Reliable Transfer*, and more particularly, in the last decade or so, the three circuits that have reviewed the issue, the Fifth, Eighth and Ninth Circuits, have unambiguously affirmed the doctrine of superseding cause in the context of maritime tort law.

In *Nunley v. M/V Dauntless Colocotronis*, 727 F.2d 455 (5th Cir. *en banc*), cert. denied, 469 U.S. 832, 105 S. Ct. 120, 83 L.Ed.2d 63 (1984), the owners of a vessel damaged as a result of a collision with an unmarked sunken barge brought suit against the barge's owners, the United States and the alleged upriver tortfeasors whose initial negligence had resulted in the sinking of the barge three years earlier. The district court dismissed the alleged upriver tortfeasors from the action on a motion for judgment on the pleadings, holding that the alleged failure by the barge's owners or the United States to mark the wreck was, as a matter of law, the superseding and thus sole proximate cause of the damage to the vessel. The Fifth Circuit reversed, holding that a failure to mark the wreck

did not, *per se*, supersede the liability of the original upriver tortfeasors. In so holding, however, the appellate court specifically upheld the concept of superseding cause and noted the relevant factors for determining when an intervening force supersedes prior negligence:

(a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;

(b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;

(c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;

(d) the fact that the operation of the intervening force is due to a third person's act or his failure to act;

(e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;

(f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Nunley, 727 F.2d at 464 (quoting *Restatement (Second) of Torts*, Section 442.)

The *Nunley* court went on to cite Section 447 of the *Restatement* in distinguishing plain intervening cause, which does not act to extinguish a prior tortfeasor's liability, from superseding cause:

The fact that an intervening act of a third person is negligent in itself or is done in a negligent

manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if

(a) the actor at the time of his negligent conduct should have realized that a third person might so act, or

(b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or

(c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

Id. at 464-65 (quoting *Restatement (Second) of Torts*, Section 447).

The Court of Appeals concluded that although the failure of other parties to mark a wreck caused by another tortfeasor may in some instances be a superseding cause of a subsequent collision, such a fact-specific determination could not be decided in a judgment on the pleadings. See also *Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 652-53 (5th Cir. 1992) (reaffirming, in a maritime product liability action, the continued vitality of the superseding cause doctrine in the Fifth Circuit following *Nunley*).

In *Lone Star Indus. v. Mays Towing Co., Inc.*, 927 F.2d 1453 (8th Cir. 1991), the Eighth Circuit likewise found no inconsistency between the doctrines of comparative fault, as applied by this Court in *Reliable Transfer*, and superseding cause:

The application of superseding cause, whether in terms of legal cause or cause in fact, is logically antecedent to application of comparative

fault. If the court can apply the doctrine of superseding cause to apportion injuries to separate causes based on the evidence, there is no need for the doctrine of comparative negligence. Thus, even though an actor's negligence may be a cause in fact of injury, superseding cause can operate as a rule of law to preclude legal cause. The question of apportioning fault is not reached.

Id. at 1459 (citing T. Schoenbaum, *Admiralty & Maritime Law*, Sections 4-8 at 139 & n.8 (1987); *Prosser & Keeton on Torts*, Section 44 at 301; *Restatement (Second) of Torts*, Section 431; and Note, *Last Clear Chance in Admiralty: A Divided Doctrine*, 66 *Tex.L.Rev.* 133, 153 (1987)).

The plaintiff in *Lone Star* sued a towing company for the sinking of the plaintiff's barge. The district court found on the basis of *res ipsa loquitur* that a crack in the stern of the barge was the result of the towing company's negligence. The district court, however, also found that the plaintiff contributed to the loss of the barge by virtue of its acts during and prior to unloading, specifically its failure to inspect the stern compartment before the section with the crack became submerged. This reduced the plaintiff's damages accordingly. On appeal, the Eighth Circuit found that the plaintiff's negligence was not just a contributing cause of the barge's sinking, but the superseding cause.

The appellate court's finding was based on two of the factors enumerated in the *Restatement*: (1) the barge owner's intervening negligence brought about a harm – sinking – different in kind than what would otherwise have occurred – the barge incurring a fracture in its stern log; and (2) the barge owner's negligent failure to inspect was not a normal result of the situation created by the

negligence of the towing company. The defendant towing company was thus relieved of all liability for the loss of the barge. *Lone Star*, 927 F.2d at 1459-60.

The other circuit to consider and affirm the continuing viability of the superseding cause doctrine after *Reliable Transfer* is the Ninth Circuit. In addition to the instant case, there have been two others affirming the applicability of the superseding cause doctrine in the admiralty tort context: *Protectus Alpha Nav. v. N. Pacific Grain Grow.*, 767 F.2d 1379 (9th Cir. 1985) and *Hunley v. Ace Maritime Corp.*, 927 F.2d 493 (9th Cir. 1991).

In *Protectus Alpha*, in the midst of a fire on a vessel moored to a pier, the terminal operator cast off the burning vessel. This prevented any further firefighting efforts. The Court of Appeals held that the terminal operator's conduct was the sole legal cause of the damage to the vessel that occurred after she was cast off, superseding any negligence on the ship's part that may have originally caused the fire. *Protectus Alpha*, 767 F.2d at 1384. The appellate court arrived at its result through application of the principles memorialized in the *Restatement (Second) of Torts*, Section 442 and a determination that the terminal operator's conduct in setting the burning ship adrift had been "grossly negligent" and thus "culpable to a serious degree." *Id.*

In *Hunley*, the owners of two colliding vessels were sued for injuries to a crewman from a third vessel who was injured during a rescue attempt. The Ninth Circuit affirmed the district court's finding that the failure of one of two colliding vessels to render assistance was the superseding and thus sole legal cause of the crewman's injuries. The court found that the failure of the crew of

the colliding vessel to render assistance was "extraordinarily negligent" within the meaning of Section 447 of the *Restatement (Second) of Torts*. *Hunley*, 927 F.2d at 497.

Both the *Hunley* and *Protectus Alpha* cases involved factual findings of "gross" or "extraordinary" negligence, findings similar to those arising from the circumstances in the instant case. The District Court found Captain Coyne to have acted negligently and in violation of maritime industry standards in five separate instances (CL 36) and to have been not merely negligent, but grossly negligent in his failure to fix and plot the EXXON HOUSTON's position for more than 90 minutes, and in his ill-conceived turn toward shore. (CL 37, 38.) These conclusions underscore the fact that Captain Coyne's errors were the sole proximate cause of the EXXON HOUSTON's grounding, the alleged negligence of any other parties being well remote in both time and place.

B. The Eleventh Circuit Has Never Directly Reviewed Superseding Cause After *Reliable Transfer* And Its One Related Case Has Unique Facts.

Against this backdrop of six cases from three circuits that have unambiguously affirmed the continued vitality of the superseding cause doctrine in the admiralty tort context, Petitioners seek to use a single holding from the Eleventh Circuit as evidence of a supposedly momentous rift among the circuits. That case, *Hercules*, 765 F.2d 1069, does not even explicitly reject the principle of superseding cause. To the contrary, *Hercules* never reaches nor discusses the concept. Thus, Respondents respectfully submit that *Hercules* is, at most, ambiguous with respect to the Eleventh Circuit's position on superseding cause.

In *Hercules*, a stevedoring company appealed from a district court judgment holding it liable for 35% of the damages suffered by a cargo owner whose shipment of telephone poles was lost when the barge carrying the poles capsized. The stevedoring company argued that even assuming it had been negligent in loading the poles, as found by the district court in the case, the true cause of the capsizing was the unseaworthiness of the barge and the failure of the barge owner and towing company to correct problems with the load during the voyage when the barge began to list. The stevedoring firm argued that under the doctrines of intervening negligence and last clear chance, its negligence was "too remote" to give rise to liability for loss of the cargo. *Id.* at 1075.

The Eleventh Circuit disagreed with the stevedoring company, concluding that under a "proportional fault" system as adopted by this Court in *Reliable Transfer*, no justification existed for applying the doctrines of *intervening negligence* (not superseding cause) and last clear chance:

Unless it can be truly said that one party's negligence did not in any way contribute to the loss, complete apportionment between the negligent parties, based on their respective degrees of fault, is the proper method for calculating and awarding damages in maritime cases.

Hercules, 765 F.2d at 1075.

Interestingly, the Eleventh Circuit explicitly ruled that the stevedoring company's negligence was a proximate cause as well as a cause in fact of the loss of the cargo:

Stevens also argues that its negligence was not a proximate cause of the capsizing. The evidence is undisputed that the shifting of the cargo caused

the barge to develop the severe port list. . . . According to the court below, Detco's and Hercules' attempts to correct for the port list, coupled with the subsequent reshifting of the cargo to starboard, led to the capsizing. The court specifically found that "[t]he excessive load and its too high center of gravity and the improper lashing contributed to the casualty." We see no reason to disturb these factual findings.

Id. at 1075, n.11.

Thus, as the Ninth Circuit noted in its opinion below in the instant case, it is not entirely clear whether the Eleventh Circuit meant simply to reject the doctrine of "normal intervening cause" as defined by the *Restatement (Second) of Torts*, Section 443, or whether it also meant to reject "superseding cause" as defined by Section 440 of the *Restatement*. Given the Eleventh Circuit's reliance on the district court's factual findings in *Hercules*, and the appellate court's refusal to disturb those factual findings, it is possible that the appellate court might not have ruled out a defense based on superseding cause had the facts supported a finding that such cause was the sole proximate cause of the damages in question, as was the case with Captain Coyne's gross negligence.

It is also worth noting that the Eleventh Circuit prefaced its rejection of intervening cause in *Hercules* with the words "[u]nless it can truly be said that one party's negligence did not in any way contribute to the loss. . . ." *Hercules*, 765 F.2d at 1075. Exactly what the Eleventh Circuit meant by these words is unclear. However, the textbook definition of the cause of action for negligence includes within its elements: (1) a duty; (2) breach of that duty; (3) causation, including both cause in fact and proximate or legal cause; and (4) damages. If proximate cause is

lacking because a party's allegedly tortious conduct is too remote in relation to the injury complained, it might "truly be said that [the] party's negligence did not in any way contribute to the loss[.]" *Id.*

Moreover, the holding in *Hercules* is clearly dependent on the facts of that case as found by the district court. In the instant case, the District Court found, after hearing all the witnesses and weighing all the evidence, that Captain Coyne's "extraordinary negligence" (as evidenced by a series of errors and omissions) was the sole proximate cause of the grounding of the EXXON HOUSTON. (CL 44.) The undisturbed findings of fact in *Hercules*, however, when weighed against the factors specified in the *Restatement*, apparently would not support a finding of superseding cause. Accordingly, the Eleventh Circuit did not have to reach the question of whether the doctrine of superseding cause remains viable in the admiralty tort context.

C. The Virtual Uniformity Of The Decisions On Point Does Not Justify Certiorari.

From this overview, it appears clear that there is virtual uniformity among the circuits and that there is no need to grant certiorari. As one notable authority on federal appellate practice has observed, differences between the circuits that "can fairly be accounted for on the basis of variations in the factual situations among the cases involved" will generally not provide a sufficient basis for review by this Court. See 13 *Moore's Federal Practice*, ¶ 810.21 (1995) (citing Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 551 (1958)). The result reached by the Eleventh Circuit in *Hercules* turned on the trial court's unique findings of fact in that case, showing

shared responsibility, not sole negligence as found by the district court here. Thus, insofar as *Hercules* can be construed to illustrate a difference among the circuits, it is a difference that "can fairly be accounted for on the basis of variations in the factual situations among the cases involved." Accordingly, review by this Court is not warranted.

II. PETITIONERS' ALLEGED CONFLICT AMONG THE CIRCUITS ON THE IMPACT OF INTERVENING NEGLIGENCE ON LIABILITY FOR BREACH OF ADMIRALTY WARRANTIES IS ILLUSORY

A. There Is No Conflict Among The Circuits Regarding The Impact Of Intervening Negligence On Liability For Breach Of Admiralty Warranties.

Petitioners' reliance on the opinions of the Court of Appeals for the Second Circuit in *Paragon Oil Co., Inc. v. Republic Tankers, S.A.*, 310 F.2d 169 (2nd Cir. 1962), cert. denied, 372 U.S. 967, 83 S. Ct. 1092, 10 L.Ed.2d 130 (1963) and *International Ore & Fertilizer Corp. v. SGS Control Services, Inc.*, 38 F.3d 1279 (2nd Cir. 1994), to somehow establish a conflict with the decision below of the Court of Appeals for the Ninth Circuit in the instant case with regard to the application of intervening and superseding negligence in admiralty breach of warranty actions is misplaced. *Paragon Oil* is in accord with the Ninth Circuit's decision below and *International Ore* appears to establish only a conflict within the Second Circuit itself and not between circuits.

In *Paragon Oil*, the Second Circuit Court, in observing that "one liable for violating a safe berth clause 'may lessen the amount of damages for which he is responsible

by showing negligence, or even lack of diligence, on the part of the person wronged, in failing to take steps to lessen certain or even probable damages,' " quoted an excerpt from *Constantine & Pickering S.S. Co. v. West India S.S. Co.*, 199 F. 964 (S.D.N.Y. 1912). That excerpt, however, when quoted in its entirety, reveals the following:

Upon this breach of contract libellant rests, and up to a certain point rightly; but even a tortfeasor may lessen the amount of damages for which he is responsible by showing negligence, or even lack of diligence, on the part of the person wronged, in failing to take steps to lessen certain or even probable damages. . . . The same principle applies here.

Id. at 967-68 (citations omitted) (emphasis added).

Thus, contrary to Petitioners' contention, the Second Circuit recognized in *Paragon* and *Constantine & Pickering* that in cases involving a breach of an admiralty contract, the principle of contributory negligence is applicable. In *International Ore*, 38 F.3d 1279, however, the Second Circuit Court noted, without authority, that contributory negligence would be irrelevant in a claim grounded solely in contract. *Id.* at 1286. *International Ore*, therefore, appears to be in conflict with *Paragon* and *Constantine & Pickering* which, in turn, support the Ninth Circuit's conclusion that the principle of intervening or superseding cause applies in contract and tort cases.

This Court's opinion in *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., Inc.*, 376 U.S. 315, 84 S. Ct. 748, 11 L.Ed.2d 732 (1964), does not compel a different conclusion. The issue before this Court in *Italia Societa* was whether the shipowner-indemnitee was required to prove negligence on the part of the stevedore-indemnitor in order to invoke an indemnity provision in

a service contract. In that case, the stevedore's alleged breach of an implied warranty of workmanlike performance resulted in injury to one of the stevedore's longshoreman employees, who then brought a claim against the shipowner for negligence and unseaworthiness. *Italia Societa*, 376 U.S. at 317. This Court held that the shipowner-indemnitor was not required to prove that the stevedore-indemnitee was negligent in order to establish the stevedore-indemnitee's liability for contractual indemnity.

In this case, however, Petitioners allege that HIRI breached a warranty of safe berth which resulted in injury to Petitioners and not to a third party. There is no claim for indemnity within these proceedings and, therefore, *Italia Societa* is inapposite.

In *Italia Societa*, this Court did not address the issue of the effect of intervening or superseding cause on a breach of warranty claim. In fact, causation of the injury arising from the breach of the stevedore's warranty was not at issue in that case. Thus, *Paragon, International Ore*, and *Italia Societa* simply do not demonstrate a conflict among the circuits regarding the application of the concept of intervening or superseding cause in breach of admiralty warranty cases.

B. The Law Of Contracts Recognizes The Application Of Intervening Or Superseding Cause In Breach Of Warranty Claims.

Comment a. of the *Restatement (Second) of Contracts*, Section 351 (1981), notes that "the requirement of foreseeability [for contract damages] is a more severe limitation of liability than is the requirement of substantial or 'proximate' cause in the case of an action in tort or for

breach of warranty." Thus, the *Restatement (Second) of Contracts* specifically recognizes that in breach of warranty actions, the tort principles of proximate cause applies.

Furthermore, *Corbin's on Contracts* provides as follows:

One of the rules most commonly laid down is that damages are not recoverable for injury that is too remote from the conduct of the defendant constituting his breach of duty. Another form of the rule is that damages are not recoverable for losses suffered or gains prevented unless the requirements of the law as to "proximate" causation are satisfied. *The form of this rule is the same whether it is being applied in the field of contracts or in the field of torts[.]*

5 *Corbin's on Contracts*, Section 997 (1964) (emphasis added).

Intervening cause or superseding cause is but one element in the determination of whether proximate or legal cause exists. See *Restatement (Second) of Torts*, Section 431.³ Respondents therefore respectfully submit that the

³ The actor's negligent conduct is a legal cause of harm to another if

- (a) his conduct is a substantial factor in bringing about the harm, and
- (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

Restatement (Second) of Torts, Section 431 (emphasis added).

Comment d. to Section 431 notes that "[t]here are certain rules which operate to relieve a negligent actor from liability because of the manner in which his negligence produces it, even though his negligent conduct is a substantial factor in bringing it about. These rules are stated in §§ 435-461." *Id.* at 430, *Comment d.*

principle of intervening or superseding cause is clearly applicable in a breach of warranty claim.

C. Petitioners Cannot Prevail Even If The Principle Of Intervening Or Superseding Cause Is Not Applied.

Even assuming that the principle of intervening or superseding cause is not applied in a breach of warranty claim, Petitioners still cannot prevail. In a breach of contract action, a breaching party "is not . . . liable in the event of breach for loss that he did not at the time of contracting have reason to foresee as a *probable* result of such a breach. The mere circumstance that some loss was foreseeable, or even that some loss of the same general kind was foreseeable, will not suffice if the loss that actually occurred was not foreseeable." *Restatement (Second) of Contracts*, Section 351, *Comment a*.

The District Court in the instant case found that Captain Coyne's attempt to turn the ship toward the coast instead of away from it was not a foreseeable consequence of the breakout. (CL 45(b).) The District Court further concluded that Captain Coyne's decision to make the final turn was not foreseeable. (CL 45(c).) These findings and conclusions have not been challenged by Petitioners. Thus, even under contract law, the actions of Exxon's Captain Coyne precluded Petitioners from recovering on any alleged breach of warranty by HIRI.

Comment e. to § 431 further notes that "[a]lthough the rules stated in this Section are stated in terms of the actor's negligent conduct, they are equally applicable where the conduct is intended to cause harm, or where it is such as to result in strict liability." *Id.* at 430, *Comment e*.

III. BIFURCATION OF THE TRIAL BY THE DISTRICT COURT WAS APPROPRIATE.

A. Bifurcation Was Not Violative Of The Doctrines Established In *Reliable Transfer*.

Petitioners argue that the bifurcation of the litigation into two parts (the time period before and including the breakout, and the time period following the breakout and until the grounding) was improper. Because the bifurcation resulted in a trial focused solely on the time period after the breakout, Petitioners argue that evidence relating to the cause of the breakout itself was improperly excluded, in violation of the dictates of *Reliable Transfer*. Petitioners argue that the breakout itself was a contributing cause of the ultimate grounding. Therefore, the exclusion of evidence supportive of Petitioners' theories of negligence causing the breakout precluded the apportionment of total fault contributing to the grounding.

That was not the case. The breakout and the ultimate grounding were two easily distinguishable and separate events, each having not so easily distinguishable elements of causation. The bifurcated trial could have resulted in a finding that the event of the grounding was not solely caused by Captain Coyne's negligent navigation. The trial court might have found that the event of the breakout was in some way a contributing cause of the event of the ultimate grounding. Had that been determined, a percentage of fault contributing to the grounding might have been assigned by the trial court to the event of the breakout. At that point, a Phase II trial would have allowed still further apportionment of faults contributing to the event of the breakout.

However, the trial court found Captain Coyne's negligence to be the sole cause of the grounding. Therefore, the cause of the breakout was no longer material to an

analysis of the cause of the grounding. Not only was the Bifurcation Order proper, it served its intended purpose of streamlining the litigation, without contradicting the dictates of *Reliable Transfer*.

B. Bifurcation Did Not Deny Petitioners Due Process.

Exxon's contentions that the district court's bifurcation "severed the unseverable" (Petition for Writ of Certiorari at p. 29) and prevented it from introducing evidence establishing Respondents' liability for breaches of warranties and tort, thereby depriving it of due process, are untenable. As stated by the Ninth Circuit Court of Appeals, Petitioners were incorrect in arguing that "the issues of causation, from breakout to grounding, are inseverable" and that the district court, by bifurcating the trial, denied Petitioners due process and deprived it of a fair trial. Respondents can do no better than to repeat what the Ninth Circuit concluded:

The district court assumed at the outset of Phase One that the defendants' negligence was a cause in fact of the grounding. There was thus no need in Phase One for Exxon to establish HIRI's fault in causing the breakout. Rather, Exxon had the burden of proving that the forces set in motion by the breakout were the proximate cause of the grounding. HIRI had the burden of showing by a preponderance of the evidence that Captain Coyne's actions subsequent to the breakout were the sole proximate or superseding cause of the grounding of the vessel, such that the defendant parties were relieved of liability for the *Houston's* loss.

... After a lengthy bench trial, the district court found that Captain Coyne's extraordinary negligence was the sole proximate cause of the

grounding of the *Houston*, obviating any need to make a comparative analysis of fault regarding the loss of the ship. "The principles of comparative negligence are not applicable when damages can be apportioned to separate causes based on evidence in the record." *Protectus Alpha*, 767 F.2d at 1383.

Opinion, United States Court of Appeals of the Ninth Circuit, Appendix A, at App. 16-17.

CONCLUSION

Because there is no conflict among the circuits significant enough to warrant a review by this Court, either with regard to the underlying tort claims or the underlying contractual claims, and because the District Court's bifurcation is consistent with *Reliable Transfer* and not violative of due process, there is no policy reason, no uniformity reason, or any other "special and important reason" for this Court to grant certiorari. Therefore, certiorari should be denied.

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Respectfully submitted,
 MAX W. J. GRAHAM, JR.
 Counsel of Record
 BELLES GRAHAM PROUDFOOT
 & WILSON
 Watumull Plaza
 4334 Rice Street, Suite 202
 Lihue, Kauai, Hawaii
 96766-1388
 (808) 245-4705

*Attorneys for Third-Party
 Respondent Bridon Fibres &
 Plastics, Ltd.*

JOHN R. LACY
Counsel of Record
GOODSILL ANDERSON QUINN
& STIFEL
1800 Alii Place
1099 Alakea Street
Honolulu, Hawaii 96813
(808) 547-5700

*Attorneys for Third-Party
Respondent Griffin
Woodhouse, Ltd.*

GEORGE W. PLAYDON, JR.
Counsel of Record
REINWALD O'CONNOR
MARRACK HOSKINS
& PLAYDON
733 Bishop Street
2400 Mekai Tower
Honolulu, Hawaii 96813
(808) 524-8350

*Attorneys for Respondents
Pacific Resources, Inc.,
Hawaiian Independent
Refinery, Inc., PRI Marine,
Inc., PRI International Inc.*

RANDALL K. SCHMITT
Counsel of Record
McCORRISTON MIHO MILLER
& MUKAI
Five Waterfront Plaza,
4th Floor
500 Ala Moana Boulevard
Honolulu, Hawaii 96813
(808) 529-7300

*Attorneys for Respondent
SOFEC, Inc.*